148 (9) (9)

Nos. 08-1553 & 08-1554

Supreme Court, U.S.
FILED
DEC 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,

and

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE WORLD SHIPPING COUNCIL IN SUPPORT OF PETITIONERS

MARC J. FINK
JOHN W. BUTLER*
JOSHUA P. STEIN
SHER & BLACKWELL LLP
Suite 900
1850 M Street, NW
Washington, DC 20036
(202) 463-2510

**Counsel of Record*

Counsel for Amicus Curiae The World Shipping Council

December 23, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH SAQN5V

28

30

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	3
1. Ocean Service Contracts Under the Shipping Act of 1984	6
a. Legal Background of Ocean Service Contracts	6
b. Ocean Service Contracts in Practice	8
2. Rail Contracts	9
a. Legal Background of Rail Contracts	9
b. Role of Rail Contracts in International Maritime Through Transportation	11
SUMMARY OF ARGUMENT	13
ARGUMENT	14
1. "K" Line Is Not a "Rail Carrier"	14
2. The Ninth Circuit Misread the Interplay between 49 U.S.C. 10502 and 10709	18
3. The Contracts in This Case Meet the Requirement for Varying Liability Limits Under Carmack	21
CONCLUSION	25

TABLE OF AUTHORITIES

CASES — Page

Great Northern R. Co. v. O'Connor, 232 U.S. 508 (1914) 4
Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94 (1915) 23
New York, N. H. & H. R. Co. v. Nothnagle, 346 U.S. 128 (1953) 22, 23, 24
Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14 (2004) ..... *passim*
Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., 547 F.3d 351 (2d Cir. 2008) 15, 16, 17
Sompo Japan Ins. Co. v. Union Pacific, 456 F.3d 54 (2d Cir. 2006) 21, 22
Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) 18

STATUTES

46 U.S.C. 30701 Note 2
46 U.S.C. 40101 *et seq.* 5
46 U.S.C. 40102(12) 17
46 U.S.C. 40102(24) 17
46 U.S.C. 40301(a)(1) 17
46 U.S.C. 40501(a)(1) 17
46 U.S.C. 40502(c) 5-6, 17
46 U.S.C. 41105(4) 17
49 U.S.C. 10102(5) 14, 15
49 U.S.C. 10501(a)(1) 13
49 U.S.C. 10501(b) 13, 17
49 U.S.C. 10502 ..... *passim*
49 U.S.C. 10502(a)(1)(B) 16, 17
49 U.S.C. 10502(c) 19
49 U.S.C. 10502(d) 19
49 U.S.C. 10709 ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
49 U.S.C. 10709(c)(1)	20
49 U.S.C. 10101-11908	20
49 U.S.C. 11706	*passim*
49 U.S.C. 11706(c)	14, 23
49 U.S.C. 13521	13, 17, 18
Interstate Commerce Commission Termination Act, P.L. 104-88, 109 Stat. 803 (1995)	6, 9
Ocean Shipping Reform Act of 1998, P.L. 105-238, 112 Stat. 1902 (1998)	7, 8, 9, 10
Shipping Act of 1984, P.L. 98-237, 98 Stat. 67 (1984)	6, 7, 9, 10, 17
Shipping Act of 1984, P.L. 98-237, § 8(c), 98 Stat. 67, 69 (1984) (repealed 1998)	7
Shipping Act of 1984, as amended, P.L. 109-304, 120 Stat. 1523 (2006)	5, 13
Staggers Rail Act of 1980, P.L. No. 96-448, 94 Stat. 1895 (1980)	*passim*

OTHER AUTHORITIES

Change of Policy; General Policy Statement, Ex Parte No. 358-F, 43 Fed. Reg. 58189 (I.C.C. Dec. 13, 1978)	10
Expedited Relief for Service Inadequacies, STB Ex Parte No. 628, 63 Fed. Reg. 71396 (Dec. 28, 1998)	19
Federal Maritime Commission, The Impact of the Ocean Shipping Reform Act of 1998 (September 2001), the OSRA Report, http://www.fmc.gov/images/pages/OSRA_Study.pdf	8
H.R. CONF. REP. NO. 96-1430 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4110	21

TABLE OF AUTHORITIES—Continued

Page

James Riffin—Petition for Declaratory Order, STB Finance Docket, No. 35245, 2009 STB Lexis 428 (Sept. 15, 2009) 15

Joint Application of CSX Corporation and Sea-Land Corporation under 49 U.S.C. § 11321, 3 I.C.C. 2d 512 (Feb. 11, 1987) .. 16

Notice of Proposed Rulemaking, Interpretation of the Term "Contract" in 49 U.S.C. 10709, STB Ex Parte No. 669, 72 Fed. Reg. 16316 (April 4, 2007)..... 11

IN THE

Supreme Court of the United States

Nos. 08-1553 & 08-1554

KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,

and

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE WORLD SHIPPING COUNCIL IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The World Shipping Council ("WSC") is a non-profit trade association of 29 companies that operate 36 international shipping lines.[1] WSC's members

[1] In accordance with the Court's Rule 37.6, WSC and its counsel certify that no counsel for a party authored this brief in whole or in part. WSC also hereby discloses that petitioner Kawasaki Kisen Kaisha Ltd. is a member of WSC. Because the expense of preparing this brief was paid from WSC's general budget, petitioner Kawasaki Kisen Kaisha Ltd. contributed in proportion to its share of the organization's membership dues (approximately 3.9%). Pursuant to Court Rule 37.3(a), all parties have consented to the filing of this brief.

include the full spectrum of vessel-operating common carriers, offering containerized, roll-on/roll-off, and car carrier services. WSC's members together provide over ninety percent of the containerized ocean transportation that serves the United States import and export trades.

A substantial percentage of the containerized shipments handled by WSC's members include the type of "through" or "intermodal" arrangements that are at issue in this case. These are shipments for which the ocean carrier takes contractual responsibility for the transportation from origin to destination, including an inland "leg" of the transportation in addition to the ocean "leg," and issues a single "through" bill of lading to the shipper (the entity that owns or controls the cargo) setting forth the terms of that transportation from beginning to end. In order to fulfill its contractual obligations to provide the inland leg of the transportation for shippers desiring through intermodal service, the ocean carrier will have entered into a subcontract—with the shipper's knowledge and consent—with rail and/or motor carriers for the inland portion of the cargo movement.

As in this case, the through bills of lading issued by WSC's members typically include clauses that specify that the Carriage of Goods By Sea Act, 46 U.S.C. 30701 Note ("COGSA"), Pet. App. 48a-61a, shall apply to the inland as well as the ocean components of the transportation, and that the COGSA liability limitations shall extend to railroads and truckers hired by ocean carriers to provide the land transportation portion of the move. Thus, a single and predictable liability rule covers the entire transportation contracted for by the ocean carrier, regardless of whether damage to the goods occurs on the ocean leg,

on the inland leg, or at an undetermined point in the journey (which is commonly the case).

The decision below undermines comprehensive changes that Congress made in the 1980s and 1990s to the statutes that regulate international ocean shipping and domestic rail transportation. In our statement, we summarize these statutory changes, the primary thrust of which was to replace the old tariff system of establishing shipping terms with a new system based on negotiated contracts. We then argue that the Ninth Circuit's reading of the relevant statutory sections violates both the plain language of those sections and the deregulatory goals of Congress. Allowing the decision below to stand would upset bargained-for expectations and could cause substantial disruptions in the way that international ocean transportation services are offered, priced, and insured.

STATEMENT

This Court in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), correctly noted that "[t]he international transportation industry 'clearly has moved into a new era—the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land.'" *Id.* at 25 (internal citation omitted). The Court also recognized that the changes in the physical manner in which cargo is moved have caused changes in the contractual relationships among the parties to that transportation: "Contracts reflect the new technology, hence the popularity of 'through' bills of lading, in which cargo owners can contract for transportation across oceans and to

inland destinations in a single transaction." *Id.* at 25-26.[2]

In *Kirby*, the Court held that a shipper's damage claim against a railroad providing inland transportation in connection with an international cargo movement was governed by two "through" (end-to-end) bills of lading—one issued by a freight forwarder to the shipper, and one issued to the freight forwarder by the ocean carrier that actually provided the maritime transportation. Reaffirming its decision in *Great Northern R. Co. v. O'Connor*, 232 U.S. 508 (1914), the Court held that an ocean carrier may bind the shipper to a limitation of liability applicable to a "downstream" inland carrier (there, as here, a railroad) under a through bill of lading issued by the ocean carrier. In analyzing the effect of the liability terms of the ocean carrier's bill of lading, the Court held "that intermediaries, entrusted with goods, are 'agents' only in their ability to contract for liability limitations with carriers downstream." *Kirby*, 543 U.S. at 34. Here, as in *Kirby*, the ocean carrier acts

---

[2] The facts of this case (and the hundreds of thousands of factually similar intermodal transportation shipments) involve shippers that for their convenience chose to engage an ocean carrier to handle the "through" move, including the inland portion of the transportation, under the ocean carrier's single bill of lading. The shipper knows in advance that the ocean carrier does not itself provide the rail service portion of the transportation, but rather that the ocean carrier arranges for the rail service on behalf of the shipper pursuant to long-term contracts that the ocean carrier will have entered into with the rail carrier. If a shipper wishes to arrange separately for the inland transportation of its goods with a truck or rail carrier and for ocean transportation with an ocean carrier, it is always free to do so.

as an "intermediary" between the shipper and the railroad.

Kirby dealt with the question of how the various transportation arrangers and physical providers relate contractually to one another under a through bill of lading, under which an ocean carrier takes responsibility for arranging for all transportation from inland origin to inland destination. *Kirby* held, based on longstanding precedent relating to contract formation for transportation services, that all of those relationships were governed by COGSA when COGSA was extended inland by contract. The present case adds the question of whether the Carmack Amendment, currently codified with respect to rail carriers at 49 U.S.C. 11706, Pet. App. 69a-70a, changes the rules under which parties may otherwise lawfully and enforceably agree to limit all carriers' liability as part of a contract for through international ocean transportation.

Modern international through transportation contracts have both a legal and a commercial aspect. The legal aspect is not as limited as the "COGSA versus Carmack" formulation enunciated by the Ninth Circuit. Instead, the contracts at issue here can only be properly understood in the context of broader Congressional policies and enactments applicable to both ocean transportation (including through transportation) and rail transportation. International ocean transportation is regulated by the Federal Maritime Commission ("FMC") under the Shipping Act of 1984, as amended, 46 U.S.C. 40101 *et seq.*[3] Service contracts are regulated under 46

---

[3] The Shipping Act of 1984, as amended, was recodified and enacted as positive law by P.L. 109-304, 120 Stat. 1523 (2006).

U.S.C. 40502. Rail transportation contracting is covered under the Interstate Commerce Act, as amended by the Staggers Rail Act of 1980 ("Staggers Act"), P.L. 96-448, 94 Stat. 1895 (1980), Pet. App. 79a-84a, and the Interstate Commerce Commission Termination Act, P.L. 104-88, 109 Stat. 803 (1995).

Although we largely leave the specifics of Title 49 of the United States Code (dealing with rail contracting) to the parties, we attempt below to put those provisions into the context of a regulatory and commercial shift that occurred in a roughly contemporaneous manner across all modes of surface transportation. Understanding the shift in the last quarter of the twentieth century from a tariff-based system of transportation to a contract-based system is crucial to a proper understanding of the relevant statutes and the transactions to which they apply.

1. Ocean Service Contracts Under the Shipping Act of 1984.

a. Legal Background of Ocean Service Contracts.

Before the enactment of the Shipping Act of 1984, P.L. 98-237, 98 Stat. 67 (1984), the terms for international ocean transportation were, for all practical purposes, governed solely by publicly filed tariffs that had the force of law under the filed rate doctrine. The 1984 Act introduced the concept of the "service contract," which, as the name suggests, is an individually negotiated contract between an ocean carrier and its shipper customer. Those contracts, however, maintained many of the attributes of tariffs, because the 1984 Act required carriers to make public an extensive list of "essential terms," including geographic scope, commodities covered, and price. Any

similarly situated shipper had a period of time after filing of the essential terms to demand a contract on those same terms—the so-called "me-too" option. *See* Shipping Act of 1984, P.L. 98-237, § 8(c), 98 Stat. 67, 69 (1984) (repealed 1998).

In addition to the fact that service contracts under the 1984 Act had as many aspects of tariff-based common carriage as they did of private contracting, their flexibility was limited by the fact that groups of ocean carriers setting common rates under the "conference" authority of the Act could control the use of service contracts by conference members. At their inception, then, and for some fourteen years thereafter, service contracts under the Shipping Act of 1984, while common, were far less flexible and freely negotiated than typical commercial contracts in industries that are not subject to pervasive economic regulation.

The Ocean Shipping Reform Act of 1998 ("OSRA"), P.L. 105-238, 112 Stat. 1902 (1998), made wholesale amendments to the Shipping Act of 1984. For present purposes, the most significant changes were to the service contracting provisions. OSRA eliminated control over service contracting by conferences (and essentially eliminated conferences), prohibited ocean carrier agreements from interfering in the service contract practices of their members, removed many of the requirements that essential terms (including price) be filed, allowed contract parties to agree to keep their contracts confidential, removed the "me-too" option, and removed contract disputes from the FMC's jurisdiction, sending those disputes

instead to the courts or, upon agreement of the parties, to arbitration.[4]

b. Ocean Service Contracts In Practice.

The practical results of the service contract changes in OSRA were dramatic. Within three years of enactment in 1998, the FMC found that OSRA had resulted in over 80 percent of containerized ocean cargo moving under contract. OSRA Report at 2. Soon after the rules had changed, the Commission found that "[i]n certain major trade lanes, some shippers are now moving nearly 100 percent of their cargo under service contracts." *Id.* at 18. Today, eleven years after OSRA, the trend has continued. Although the confidentiality of contracts makes precise statistics unavailable, WSC's members' experience is that service contracts govern virtually all U.S. international liner shipping transportation in the major trade lanes. Terms routinely addressed in service contracts (some of which terms are also reflected in the bills of lading that are typically incorporated by reference in those contracts) include price, minimum volume requirements, delivery times, availability of equipment, and limitations on liability for both ocean and inland transportation.

In addition to their ubiquity, the other features of international ocean service contracts relevant here are that: (1) they routinely cover intermodal through moves involving inland transportation legs in the United States, (2) depending on the size and business

---

[4] For a summary of service contract regulation both before and after OSRA, *see* Federal Maritime Commission, The Impact of the Ocean Shipping Reform Act of 1998, at 16-17 (September 2001) ("OSRA Report"). The OSRA Report is available electronically at http://www.fmc.gov/images/pages/OSRA_Study.pdf.

structure of the shipper, they may address tens or hundreds of different commodities in multiple trade lanes around the world, and (3) they are typically for a minimum period of one year, sometimes longer.

In short, terms in service contracts are negotiated with the purpose of establishing a long-term commercial relationship between the ocean carrier and the shipper covering all (or virtually all) of the business between them. Once those terms are set, any individual shipment covered under that contract, along with the accompanying documentation, is handled as a routine matter of implementing the terms already agreed. Terms—and particularly liability terms—are not re-negotiated with each shipment. This is a high-volume business, with over fifty thousand shipping containers entering or leaving the U.S. every day. If each shipment were the subject of individual negotiation, the international intermodal transportation system simply could not handle that volume.

2. Rail Contracts

a. Legal Background of Rail Contracts.

WSC anticipates that the parties will thoroughly brief the treatment of rail contracts under the Interstate Commerce Act, as amended by the Staggers Act, the ICC Termination Act, and other statutes. WSC wishes only to note that the movement away from a regulated common carrier model and toward a contract-based commercial environment that occurred gradually in the international ocean shipping industry through the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998 was matched by an earlier and even more dramatic deregulatory shift in the rail industry.

Before the enactment of the Staggers Act, the rail industry, like the international ocean shipping industry before the 1984 Act and OSRA, was a creature of common carrier regulation driven by publicly filed tariff rates. Although the Interstate Commerce Commission ("ICC") attempted in the late 1970s to provide some commercial flexibility by allowing for certain narrowly defined classes of contract carriage,[5] Congress found that the failing rail industry required much stronger medicine. In the Staggers Act, Congress up-ended rail regulation, taking virtually all rail contracts entirely out of coverage by of the statute, and making them subject only to otherwise applicable contract law.

The Surface Transportation Board ("STB") in 2007 described the scope and effect of the contract provisions of the Staggers Act this way:

> Congress viewed the ICC's changed policy as insufficient, because it had "a number of restrictions and uncertainties and [had] resulted in the limited use of contracts." To ensure that shippers and railroads would be free to enter into rail transportation contracts "without concern about whether the ICC would disapprove a contract," in the Staggers Rail Act of 1980 (Staggers Act), Congress amended the statute to provide that railroads "may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." Former 49 U.S.C. 10713(a)(1995) (now codified at 49 U.S.C. 10709(a)). When originally enacted, the provision further stated that "a rail

---

[5] *See* Change of Policy; General Policy Statement, Ex Parte No. 358-F, 43 Fed. Reg. 58189 (I.C.C. Dec. 13, 1978).

> carrier may not enter into a contract with purchasers of rail service except as provided in this section." Former 49 U.S.C. 10713(a)(1995).
>
> Congress also expressly removed all matters and disputes arising from rail transportation contracts from the ICC's (and now the Board's) jurisdiction. See former 49 U.S.C. 10713(i)(1995) (now codified at 49 U.S.C. 10709(c)). If the parties have a dispute regarding such a contract—such as whether there has been adequate performance or whether the contract is void because it was signed under duress—such matters are to be decided by the courts under applicable state contract law. See former 49 U.S.C. 10713(i)(2)(1995) (now codified at 49 U.S.C. 10709(c)(2)). Congress also explained that, if someone believes that a contract is anticompetitive, "the antitrust laws are the appropriate and only remedy available." Congress considered the contract rate provision of the Staggers Act to be "among the most important in the bill."

Notice of Proposed Rulemaking, Interpretation of the Term "Contract" in 49 U.S.C. 10709, STB Ex Parte No. 669, 72 Fed. Reg. 16316 (April 4, 2007)(footnotes omitted).

b. Role of Rail Contracts in International Maritime Through Transportation.

As a factual and a conceptual matter, contracts between ocean carriers and rail carriers are subcontracts under the service contracts that are negotiated between ocean carriers and their shipper customers. Because ocean carriers do not themselves have the capability to provide rail services, ocean carriers must purchase rail service from railroads if the ocean

carriers are to be able to offer through transportation to their customers.

Because service contracts between ocean carriers and shippers most typically last for at least a year, the ocean carriers must project their costs for that year in advance in order to set their prices to their customers (shippers) with whom they negotiate service contracts. For intermodal through transportation, one of the primary costs for ocean carriers is the inland transportation that they must purchase from rail or motor carriers. Before an ocean carrier can negotiate rates and terms with its customers, it must negotiate with the railroads. Because of the need for predictability of prices and the flexibility to handle a broad range of shipment types under a single contract, contracts between railroads and ocean carriers are typically long-term arrangements that apply common liability limits for all shipments within their scope.

Because the rail contract represents the "small end of the funnel" (i.e., tens of thousands of shippers negotiate with fewer than fifty ocean carriers, who negotiate with a maximum of seven Class I railroads) in terms of contracting for international through transportation, the contracts between ocean carriers and rail carriers must be broad and flexible enough to cover a wide variety of cargoes originating from thousands of shippers. Even more so than in the case of ocean service contracts, contracts between ocean carriers and railroads of necessity must have basic terms that apply to all cargo moved under those contracts. Without the ability to deal with issues such as limitations on liability in such a comprehensive fashion, it would be impossible for ocean carriers to arrange rail carriage in advance so as to allow

those ocean carriers to offer through transportation in their service contracts with their shipper customers.

SUMMARY OF ARGUMENT

First, the Ninth Circuit's holding that "K" Line is a rail carrier because "K" Line subcontracted for rail services that it re-sold under a contract for international through transportation is wrong. The statutory language at 49 U.S.C. 10501(a)(1) regarding rail/water combinations relied upon by the Ninth Circuit to convert "K" Line into a railroad defines certain obligations of rail carriers when they employ water transportation; it does not define who is a rail carrier. In any event, the water transportation over which the Board has jurisdiction does not include international ocean transportation. *See* 49 U.S.C. 13521 (defining STB jurisdiction over water carriers). Finally, treating an ocean carrier issuing a through bill of lading as a rail carrier creates an irreconcilable conflict between the FMC's intermodal jurisdiction under the Shipping Act of 1984, as amended, and the "exclusive" jurisdiction of the STB over railroads. *See* 49 U.S.C. 10501(b).

Second, the Ninth Circuit's holding that the Carmack Amendment applied—even though the rail transportation was provided under a contract that would ordinarily be exempt from Carmack—was premised on the incorrect assumption that transportation that has been exempted under 49 U.S.C. 10502 is outside of the Board's jurisdiction, and is therefore outside of the scope of 49 U.S.C. 10709 (which removes contracts for rail transportation within the Board's jurisdiction from coverage by Carmack and other statutory requirements). Both the statute and

the Board's cases make clear that the issuance of an exemption under 10502 does not divest the Board of jurisdiction. The Ninth Circuit's atextual reading contradicts Congress' plain intent to free rail contracts from regulation by the Board.

Third, even if section 10502 precluded the application of 10709 and instead required a carrier and a shipper to reach a written agreement on alternative terms under 49 U.S.C. 11706(c), the through ocean bills of lading issued by "K" Line satisfy those requirements. Contrary to the lower court's unexplained assumption that a carrier wishing to contract out of Carmack's liability scheme must first offer "full Carmack terms" through some particular (but unspecified) method, the statute does not so require. Any such requirement that arguably existed in the past was based on statutory language that was removed by the Staggers Act and on the related constraints of a tariff-based system in which shipping terms were largely a matter of adhesion. The Staggers Act fundamentally changed that system. To require "magic language" in a negotiation between a shipper and an ocean carrier in order to effectuate an agreement on liability limits under 49 U.S.C. 11706(c) would be inconsistent with the freedom of contract principles embodied in Congressional deregulation of both the international shipping and rail transportation industries.

ARGUMENT

1. "K" Line Is Not a "Rail Carrier."

Many, although not all, of the Ninth Circuit's errors flow from its holding that "K" Line is a "rail carrier" within the meaning of 49 U.S.C. 10102(5); that is, "a person providing common carrier railroad

transportation for compensation." *See* Pet. App. 12a-13a. The Ninth Circuit reached that decision through something of a "ransom note" amalgam of several definitions and jurisdictional statements in the statute. Without unduly repeating points that the petitioners will address, the lower court's conclusion that an ocean carrier becomes a rail carrier by offering a through bill of lading fails for three independent reasons, all of which are suggested in the Second Circuit's recent decision in *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 547 F.3d 351, 356-58 (2d Cir. 2008).

First, the decision below never addressed the core question of whether "K" Line was "providing common carrier railroad transportation for hire," 46 U.S.C. 10102(5), the definition of a "rail carrier." The World Shipping Council is not aware of any appellate decision other than the decision under review that holds that an ocean carrier that subcontracts with a railroad in order to provide through transportation to a shipper becomes a "rail carrier" by virtue of that subcontract. That ocean carriers do not become rail carriers through such transactions is supported by consistent ICC and STB rulings on the subject. Just this year, the STB reiterated that "[a]t a minimum, under agency precedent, for an entity to qualify as a rail carrier, it must (1) hold itself out as a common carrier for hire, and (2) have the ability to carry for hire." James Riffin—Petition for Declaratory Order, STB Finance Docket No. 35245, slip op. at 5, 2009 STB Lexis 428, at *8 (Sept. 15, 2009) (footnote collecting cases omitted).

In an earlier decision, the ICC directly addressed the question of whether an international ocean carrier was a rail carrier either by virtue of owner-

ship of rail cars or by virtue of the fact that the ocean carrier subcontracted for rail services that it then offered as part of a through international transportation service that included rail transportation. *See* Joint Application of CSX Corporation and Sea-Land Corporation under 49 U.S.C. § 11321, 3 I.C.C. 2d 512 (Feb. 11, 1987). After rejecting the argument that the ownership of rail equipment was sufficient to bestow rail carrier status, the Commission turned to the central question of whether the ocean carrier held sufficient control over the rail service to be deemed to be "offering" that service within the meaning of the statute. Under circumstances that involved greater involvement in the rail carriage than the mere subcontracting in the present case, the Commission held that "we agree with applicants that neither Sea-Land [the ocean carrier] nor any of its subsidiaries controls the rail service involved here. No evidence has been presented to refute the assertion that all operational aspects of the rail transportation service are controlled by the participating railroads, including scheduling and the right to route traffic and add additional cars. Therefore, as applicants argue, Sea-Land is not operating, performing, or offering rail service." *Id.* at 519; *see also Rexroth*, 547 F.3d at 363-64 (collecting cases requiring "actual operation of trains" for rail carrier classification).

The fact that "K" Line did not "offer" rail transportation for hire—an issue the Ninth Circuit never addressed—ends the inquiry into whether "K" Line is a rail carrier; it is not. There are, however, two other reasons the Ninth Circuit erred on this point. First, its reliance on the provision at 49 U.S.C. 10502(a)(1)(B) dealing with "transportation by a rail carrier that is . . . by railroad and water, when the transportation is under common control, manage-

ment, or arrangement for a continuous carriage or shipment," is misplaced for a least two reasons. The first is that, because that subsection is applicable only to "rail carriers," its application must *follow* a determination that a particular entity is a rail carrier; the subsection cannot be *the basis* of such a determination. Equally fundamental, the Board's jurisdiction over water transportation only applies to the movement of cargo by water between two states, or to state-to-state transportation preceding or following transshipment for international transportation. *See* 49 U.S.C. 13521 (discussed in *Rexroth*, 547 F.3d at 357 n.5 and n.6). Here, the only water transportation was between China and the United States, with no ancillary transportation between any two states. Thus, even if 10502(a)(1)(B) could be used to bootstrap a *domestic* water carrier into rail carrier status, the ruse would still fail here, where the water transportation is international.

Third, the construction adopted by the Ninth Circuit—that an international ocean carrier becomes a rail carrier by subcontracting with a railroad for inland carriage on the shipper's behalf—would create an irreconcilable conflict between the Interstate Commerce Act and the Shipping Act of 1984. This is so because the FMC under the Shipping Act has jurisdiction over inland transportation provided under a through bill of lading issued by an ocean carrier in the foreign commerce of the United States. *See* 46 U.S.C. 40102(12), 40102(24), 40301(a)(1), 40501(a)(1), 40502(c), and 41105(4) (all relating to FMC jurisdiction over inland transportation associated with through movements). 49 U.S.C. 10501(b), on the other hand, provides that the "jurisdiction of the Board over [] transportation by rail carriers . . . is exclusive."

This conflict cannot be finessed. If "K" Line is a rail carrier with respect to the inland portions of the through transportation in this case, then the STB, and only the STB, has jurisdiction, which would nullify in every such case the otherwise applicable jurisdiction of the FMC. It is not necessary to nullify the FMC's inland authority in order to give effect to the STB's jurisdictional statute, however. If the Interstate Commerce Act is read as applying only to entities that physically provide rail carriage, and the water transportation jurisdiction of the STB is limited to the plain terms of section 13521, then any conflict is avoided, and no jurisdictional gap is created. "[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

2. The Ninth Circuit Misread the Interplay between 49 U.S.C. 10502 and 10709.

The Union Pacific will no doubt address the Ninth Circuit's error in interpreting the relationship between sections 10502 and 10709. Because the point so directly affects the contracting practices of ocean carriers, however, WSC addresses it briefly.

The Ninth Circuit's holding that a rail contract for transportation that has been exempted from regulation under 49 U.S.C. 10502 may not be removed from regulation under Section 10709 violates the plain words of the statutory sections and contradicts the agency's interpretation. The lower court's error appears to flow from the incorrect assumption that

transportation that has been exempted from regulation under authority of section 10502 is thereby placed outside of the STB's jurisdiction. *See* Pet. App. 19a (indicating through emphasis that "rail carriers providing transportation *subject to the jurisdiction of the Board*" under 10709 are by definition providing "nonexempt transportation"). Once it made the erroneous finding that exempt transportation was outside of the jurisdiction of the Board, then the Ninth Circuit was bound by the language of 10709 to find that that section did not apply, because 10709 by its terms is only applicable to contracts for rail transportation that is "subject to the jurisdiction of the Board. . . ."

The problem with the Ninth Circuit's reasoning is that the statute is clear that the Board *does* retain jurisdiction when it issues an exemption, because subsection 10502(c) allows the Board to specify the duration of an exemption, and, more telling, subsection 10502(d) authorizes the Board to revoke an exemption. The Board could not revoke an exemption if it did not retain jurisdiction, and the Board has so held. *See* Expedited Relief for Service Inadequacies, STB Ex Parte No. 628, 63 Fed. Reg. 71396, 71398 (Dec. 28, 1998), in which the Board stated in response to an assertion that it lacked jurisdiction over exempted transportation that: "AAR is clearly wrong with respect to exempt traffic. We retain full jurisdiction to deal with exempted transportation, as we can revoke the exemption at any time, in whole or in part, under section 10502(d)."

Absent the Ninth Circuit's mistaken understanding of the effect of an exemption on the Board's jurisdiction, it would have been compelled by the plain language of section 10709 to hold that the rail trans-

portation here, because it was conducted under a rail contract between "K" Line and the Union Pacific, was not subject to Carmack. That is so because section 10709(c)(1) provides that "[a] contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such a contract violates a provision of this part." "This part" includes 49 U.S.C. 10101 through 11908, which encompasses the Carmack Amendment as applicable to rail transportation, codified at 49 U.S.C. 11706.

Because essentially all rail transportation sold to international ocean carriers is provided under contract, this simple statutory basis is sufficient both to decide this case and to provide the guidance and certainty necessary to allow the international transportation system to order its contractual relationships to provide predictable and efficient operations. Because *Kirby* makes clear that the ocean carrier is authorized to negotiate liability limitations with the inland carrier with binding effect on the ocean carrier's shipper customer, the applicability of Carmack is the only remaining potential impediment to the parties' being allowed to give effect to their bargained-for contract. Once the existence of the rail contract removes Carmack from the picture, the operational, insurance, and legal problems that flow from the lower court's decision disappear. That result also gives effect to the clearly expressed Congressional intent that rail transportation contracts be subject to contract law and nothing else.[6]

---

[6] The legislative history of the Staggers Act reinforces the conclusion that the section 10502 exemption power was to be

3. The Contracts in This Case Meet the Requirement for Varying Liability Limits Under Carmack.

Although the argument immediately above makes it unnecessary to reach the Ninth Circuit's holding that "the 'combined effect' of 10502 and 11706 is to permit carriers providing exempt transportation to contract for terms that are different from Carmack's defaults so long as they first offer the shipper the option of full Carmack protections, presumably at a higher rate," Pet. App. 28a, we address the point both in the interest of completeness and also because it relates to the broader issue of contract freedom discussed in our statement. The Ninth Circuit cited only to the Second Circuit's decision in *Sompo Japan Ins. Co. v. Union Pacific*, 456 F.3d 54, 60 (2d Cir. 2006), for the proposition quoted immediately above. *Sompo*, in turn, relies on decisions of other circuits, which themselves lack any textual statutory underpinning and which are based on an outdated understanding of how the transportation industry operates and is regulated.

---

complementary to, not mutually exclusive of, any broader deregulatory decisions (such as those in section 10709) that Congress made in the statute: "The policy underlying this provision [current 10502] is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress." H.R. CONF. REPT. NO. 96-1430 (1980), *reprinted in* 1980 U.S.C.C.A.N 4110, 4137. Thus, what is now section 10502 was not designed to limit the deregulatory exemptions granted by Congress; it was designed to add to them.

The Ninth Circuit's opinion, as well as the decision in *Sompo* and those of other federal courts imposing the requirement of an explicit offer of "full Carmack protection," appear to stem from a misapplication of the Court's decision in *New York, N. H. & H. R. Co. v. Nothnagle*, 346 U.S. 128 (1953), a case that was cited as supporting authority in *Kirby*, 543 U.S. at 19. In *Nothnagle*, the carrier argued that it effectively limited its liability for lost baggage through its tariff on file with the Interstate Commerce Commission. The tariff stated that the carrier's liability would be limited to $25 for lost baggage unless the passenger had in writing declared a higher valuation.

The Court noted that the Carmack Amendment, as it existed at the time, allowed carriers to limit their liability for property "concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property." *Nothnagle* at 134 (quoting 39 Stat. 442, 49 U.S.C. § (11)). The Court held that the form of the carrier's tariff complied with the requirements of the statute, but that the carrier's liability was not effectively limited under the statute because "[t]here was no 'value declared in writing by the shipper or agreed upon in writing.'" *Nothnagle* at 135. Specifically, the Court noted that "only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained." *Id.* Because the carrier there did not even issue a receipt for the baggage at issue, the Court held that the plaintiff "had no reasonable

opportunity to discover" the carrier's limitation of liability. *Id.*

Before the passage of the Staggers Act, rail carriers were required to file their rate offerings in tariffs filed with the ICC. Under the so-called "filed rate doctrine," only filed rates could be charged; any other rate was not just unenforceable, it was unlawful. *See generally Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) ("Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge."). Thus, before Staggers, a carrier wishing to limit its liability under Carmack had to: (1) obtain authority to publish "released value" rates from the ICC; (2) actually publish those rates in its tariff, associating different liability limits with different freight rates; and (3) provide the shipper with a reasonable opportunity to declare the cargo value.

In the Staggers Act, Congress fundamentally changed the regulation of ground transportation, allowing rail carriers to enter into confidential contracts with shippers instead of setting rates through filed tariffs. In addition to removing the requirement that sliding-scale "released value" rates be published in tariffs, section 211 of the Staggers Act also removed the requirement that rail carriers obtain prior Commission approval of reduced liability limits. Thus, after Staggers, the only remaining requirement for a carrier to limit its liability is that the carrier provide its customer "an opportunity to declare the full value" of the cargo. *See Kirby*, 543 U.S. at 19 (citing *Nothnagle*, 346 U.S. at 135). Under Carmack as it exists today after Staggers, that limitation may be effected "by written declaration of the shipper or by a written agreement between the shipper and the carrier . . . ." 49 U.S.C. 11706(c), Pet. App. 70a.

Shippers today have much greater opportunities to negotiate liability limits than they did before the Staggers Act. Because virtually all of the cargo of the sort at issue here moves under service contracts (between the shipper and the ocean carrier) and rail contracts (between the ocean carrier and the rail carrier), there is much more give-and-take between the carrier and the shipper than in the past. Because shippers today go through a contracting process before handing their cargo over to the carrier for transportation, as opposed to being bound by law to a tariff that they might never have seen under the old system, it would be difficult today to conceive of a situation in which a shipper did not have a full opportunity to declare a value in excess of the carrier's stated limitation.

In *Kirby*, the Court cited *Nothnagle* for the proposition that a carrier has the duty to give a shipper a "fair opportunity to declare value," and that the carrier satisfied that requirement through negotiation of the terms of the bill of lading. *Kirby*, 543 U.S. at 19. Just as in *Kirby*, "K" Line's bills of lading here,[7] through incorporation of COGSA, provided fair notice and constituted a written agreement to value the property at $500 unless the shippers indicated a higher value on the bill of lading. The shippers did not so declare. Thus, even if Carmack applied here, which it does not, the limitations on the rail carrier's liability set forth in "K" Line's bills of lading are enforceable.

---

[7] The applicable service contracts signed by the parties here all incorporate the bills of lading and state that the bills control over the service contracts. Joint App. 190.

CONCLUSION

The Ninth Circuit erred in holding that "K" Line became a railroad by subcontracting with a railroad. The lower court also failed to recognize that the rail transportation here is exempt from the Carmack Amendment under the plain terms of 49 U.S.C. 10709. Even if Carmack applied, however, the terms of the through ocean bills of lading and service contracts negotiated between the ocean carrier and the shippers satisfied the "written agreement" requirement for limiting liability under Carmack. The decision below should be reversed and vacated, and the liability of the ocean carrier and the railroad should be limited to the COGSA limits to which the shippers agreed.

Respectfully submitted,

MARC J. FINK
JOHN W. BUTLER*
JOSHUA P. STEIN
SHER & BLACKWELL LLP
Suite 900
1850 M Street, NW
Washington, DC 20036
(202) 463-2510
Counsel of Record

December 23, 2009